

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MARIA OFELIA TURCIOS

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

Docket No. 1,042,029

ORDER

STATEMENT OF THE CASE

Claimant requested review of the November 18, 2011, Award entered by Administrative Law Judge Pamela J. Fuller. The Board heard oral argument on February 22, 2012. Stanley R. Ausemus, of Emporia, Kansas, appeared for claimant. Abigail Lea Pierpoint, of Kansas City, Missouri, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found that claimant had a 16 percent permanent partial impairment to the whole body.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues the ALJ's Award is contrary to the evidence and asks the Board to find that claimant's permanent partial disability award should be increased to a minimum of \$35,065.09 based upon the record and the rating opinions of Dr. Pedro Murati.

Respondent argues the Board should adopt the findings of the independent medical examiner, Dr. David Hufford, and limit claimant's functional disability to 10 percent to the body as a whole and 11 percent to the left upper extremity. Respondent contends the ALJ miscalculated claimant's award, arguing there should be a separate award calculation for each injury level as set forth in *Redd*.¹

¹ *Redd v. Kansas Truck Center*, 291 Kan. 176, 239 P.3d 66 (2010).

The issue for the Board's review is: What is the nature and extent of claimant's disability?

FINDINGS OF FACT

Claimant is employed by respondent and sustained an industrial accident on or about November 2, 2007. She suffered injuries to her low back, left hand, left arm, left shoulder, and neck. She underwent surgery on her left hand, followed by physical therapy. She received epidural injections in her neck and received a TENS unit for her back. She complains she still has constant pain from her left hand up over her wrist and arms and into her left shoulder, extending to the left side of her neck. She cannot lift her left arm any higher than about 70 degrees. Claimant has low back pain in an area from three inches above to three inches below her belt line. She cannot sit or stand for long and feels pain when she twists or bends. Claimant testified she has constant pain in the back of her neck and has a problem moving her head from side to side and looking up, although she can look down.

On cross-examination, respondent's attorney noted claimant frequently turned her head to listen to the interpreter. Claimant explained: : "Yes, I do it, but it's—it's an effort that I have to make because I don't want to end up just looking like that."² Respondent's attorney also noticed that as claimant listened to questions, she frequently nodded her head yes or no. Claimant testified: "I—I always do a little bit of an exercise because I don't want to end up just straight like that."³

On May 27, 2008, claimant's treating physician, Dr. Michael Baughman, concluded that claimant was in DRE Cervicothoracic Category II of the AMA *Guides*⁴ and therefore had a 5 percent permanent partial impairment to the whole body. However, he opined that 1/2 of claimant's impairment was due to preexisting degenerative disc disease and 1/2 was due to an aggravation of that preexisting condition. He recommended claimant have a permanent work restriction limiting her lifting to less than 40 pounds and her pushing and pulling to less than 80 pounds.

Dr. Pedro Murati examined claimant on January 4, 2011, at the request of claimant's attorney. Her chief complaints were that she was not able to lift both shoulders, she had pain in her neck going down into both wrists with numbness and tingling, and she had pain in her left shoulder. Claimant told Dr. Murati she had worked for respondent for 9 1/2 years and was currently still employed by respondent. She said her injury was due to working

² P.H. Trans. at 18.

³ *Id.*

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

with scissors in a repetitive nature, cutting meat and lifting 60-pound boxes. She began to experience pain in her neck, upper back, wrists and shoulders. She was treated with injections that gave her no relief.

After examining claimant, Dr. Murati diagnosed her with bilateral carpal tunnel syndrome⁵, left ulnar cubital syndrome, myofascial pain syndrome affecting the cervical and thoracic paraspinals, and permanent aggravation of the left thumb CMC joint. He noted that within a reasonable medical probability, all her diagnoses were direct results of her work-related injuries that occurred on November 2, 2007, and January 22, 2010.

Dr. Murati recommended the following restrictions: No climbing ladders or crawling; no repetitive grasping or grabbing using the left upper extremity; no heavy grasping with either the right or left upper extremities; no lifting, carrying, pushing or pulling more than 10 pounds occasionally or more than 5 pounds frequently. She should only occasionally repetitively grasp with her right hand. She should only occasionally repetitively use hand controls with her left hand. She could frequently use hand controls with her right hand. She should work no more than 18 inches from the body, avoid awkward positions of the neck, use wrist splints while working and at home. She should not use hooks, knives or vibratory tools.

Using the *AMA Guides*, Dr. Murati rated claimant's permanent partial impairment as follows: 10 percent to the left upper extremity for carpal tunnel syndrome, 10 percent to the left upper extremity for left ulnar cubital syndrome, and 18 percent to the left upper extremity for severe glenohumeral crepitus of the left shoulder. These combine for a total of 33 percent left upper extremity impairment and convert to a 20 percent whole person impairment. For claimant's myofascial pain syndrome affecting the cervical paraspinals, Dr. Murati found her to be in DRE Cervicothoracic Category II for a 5 percent whole person impairment. For claimant's myofascial pain syndrome affecting the thoracic paraspinals, Dr. Murati found her to be in DRE Thoracolumbar Category II for a 5 percent whole person impairment. These impairments combine for a 28 percent whole person impairment.

Dr. David Hufford examined claimant on two occasions, both at the request of the ALJ. His first examination of claimant was on April 23, 2009. Claimant told Dr. Hufford she initially had symptoms in her left hand with the appearance of a mass in the dorsum of the base of the left thumb. She was seen by Dr. Baughman and was diagnosed with a giant cell tumor. She had surgery and was returned to work with restrictions. She told Dr. Hufford that her restrictions were not followed and approximately four months after her surgery she was lifting cattle heads overhead when she felt a sudden, sharp pain across the base of her neck into the shoulders. She said the neck pain radiated into both upper

⁵ Claimant's injuries in this docketed claim are limited to her low back, neck, left shoulder, left arm and left hand. Claimant's complaints to her right upper extremities are the focus of her claim in Docket No. 1,049,655.

extremities and she developed intermittent paresthesias in the thumb, index and middle fingers of both hands, right more than left. A cervical MRI showed extensive degenerative disc disease through the cervical spine, greatest at C5-6, with some neuroforaminal encroachment.

Claimant told Dr. Hufford she continued to have pain throughout the base of her neck into the shoulders posteriorly. She continued to have paresthesias of the hands. She had pain in her left shoulder which she attributed to activities she was directed to perform in an FCE. Claimant described her work at respondent as repetitive gripping and grasping and pulling and use of scissors. She complained of a pain in her right index finger and the tip of the index finger became crooked. She had pain at the site of her previous surgical excision in the web space between her thumb and index finger of her left hand.

Dr. Hufford's examination of claimant's cervical spine revealed tenderness over all the vertebrae without localization, tenderness in all the cervical paraspinal musculature without trigger points or guarding, and tenderness over the scapular elevators on both the right and left without trigger points or guarding, and generalized tenderness of the thoracic spine. She had mild tenderness of the acromioclavicular joint and lateral acromion of each shoulder. She had no tenderness in the elbows, forearms or wrists. Claimant had no nodules or triggering in either hand. Dr. Hufford diagnosed claimant with a work-related lifting injury with aggravation of cervical degenerative disease. Using the *AMA Guides*, he rated her as being in DRE Cervicothoracic Category II for a 5 percent whole person impairment. He found no sign of impairment in claimant's shoulders, elbows, wrists or hands related to her injury. Dr. Hufford recommended claimant have restrictions of no lifting greater than 35 pounds with occasional lifting of 15 pounds and frequent lifting of 7 pounds. He recommended she avoid awkward positions of her neck and all overhead use of her arms. He recommended claimant have task rotation. Dr. Hufford further suggested claimant have ongoing use of a TENS unit, over-the-counter Ibuprofen, and one or two physical therapy sessions for instruction in a home exercise program.

Dr. David Hufford performed a second court-ordered independent medical examination of claimant on April 26, 2011, for the specific purposes of providing an impairment rating and providing recommendations concerning restrictions. Claimant described her current work at respondent as being repetitive in nature and said it involved lifting boxes weighing 60 pounds, as well as twisting and turning of her trunk. She complained of pain throughout the entire spine as well as pain in her shoulders throughout her remaining upper extremities. Her symptoms were consistent with those set out in Dr. Hufford's previous report of April 2009. Dr. Hufford noted there was a slight change in her symptomatology with the appearance of paresthesias in the ulnar nerve distribution of the left hand. Claimant also complained of low back pain that radiated into the left lower extremity with some paresthesias. She has had task rotation at work to lessen her symptoms, but that was not successful.

Dr. Hufford's examination of claimant's cervical, thoracic and lumbar spine revealed no direct vertebral tenderness at any level. Claimant had tenderness throughout the paraspinal musculature at all levels, but she had no trigger points or guarding. Claimant had generalized tenderness across the scapular elevators bilaterally in the shoulders, also without trigger points or guarding. Claimant had tenderness at all four epicondyles, medial and lateral, bilaterally. There was no evidence of swelling, tenderness or crepitus in the forearms or wrist. Claimant had no evidence of thenar or hypothenar atrophy, no triggering of any finger in either hand, and no evidence of synovitis in any joint. Dr. Hufford diagnosed claimant with generalized myofascial and soft tissue injury from repetitive motion work activity.

Based on the AMA *Guides*, Dr. Hufford found claimant was in DRE Cervicothoracic Category II for a 5 percent impairment to the whole body. Further, he found claimant was in DRE Lumbosacral Category II for a 5 percent impairment to the whole body. In regard to claimant's left upper extremity, Dr. Hufford rated claimant as having a 7 percent impairment to the left upper extremity for left ulnar nerve entrapment at the elbow and a 4 percent impairment to the left upper extremity for medial and lateral epicondylitis. These combine for an 11 percent left upper extremity impairment, which converts to a 7 percent whole person impairment. When the whole body impairments are combined, Dr. Hufford opined that claimant has a 16 percent whole person impairment.

Dr. Hufford noted he previously recommended claimant have frequent task rotation and avoidance of awkward positions of the neck. He also noted claimant's description of her current work activity of repetitively lifting 60-pound boxes falls outside his previous lifting restriction. In addition to his previous restrictions, Dr. Hufford added avoidance of repetitive bending at the waist and twisting and turning of the trunk.

PRINCIPLES OF LAW

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.⁶ The test is not whether the accident causes the condition, but whether the accident aggravates or

⁶ *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

accelerates the condition.⁷ An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.⁸

K.S.A. 44-510d(a) states:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

....

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

....

(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. . . . Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

⁷ *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

⁸ *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

In *Redd*,⁹ a case where the claimant had suffered permanent partial impairments to separate portions of his right and left upper extremities, the Kansas Supreme Court stated:

[W]e hold the best way to reconcile K.S.A. 44-510d(a)(23) with the statutory schedule is to use the Guides as a mechanism to evaluate impairment at the level of the injury and not to apply its provisions that call for combining injuries first into regional, and then whole body, impairments. As such, separate awards should be provided at each injury level.

In *Bryant*,¹⁰ the Kansas Supreme Court held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.

ANALYSIS

The Board agrees with the ALJ's findings and conclusions regarding the nature and extent of claimant's disability. In this instance, the opinions of the court-ordered independent medical examiner, Dr. Hufford, are found to be the most credible. As such, claimant's permanent partial disability award should be based upon the following percentages of functional impairment:

5 percent to the body as a whole for the cervicothoracic injuries;
5 percent to the body as a whole for the lumbosacral injuries;
7 percent to the left upper extremity for ulnar nerve entrapment at the elbow;
4 percent to the left upper extremity for medial and lateral epicondylitis.

Based on *Bryant* and *Goodell*, the Board finds that the percentages of functional impairments for the scheduled injuries should be converted to the body as a whole and combined with the percentage of impairment for the nonscheduled injuries for a single general body disability award.

CONCLUSION

As a result of her work-related injuries, claimant has sustained a 16 percent permanent partial general body disability.

⁹ *Redd*, 291 Kan. at 198.

¹⁰ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986). See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009); *Daulton v. State of Kansas*, Docket No. 1,038,284, 2011 WL 800421 (Kan. WCAB Feb. 28, 2011).

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Pamela J. Fuller dated November 18, 2011, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of February, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Abigail Lea Pierpoint, Attorney for the Self-Insured Respondent
Pamela K. Fuller, Administrative Law Judge